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No. 149

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648016—62——1

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 145

KALMAN GREENHILL AND FRANK PROCTOR, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 2001–2006; Pet. App. 1–14) is reported at 298 F. 2d 405.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 1962 (R. 2017; Pet. App. 1, 14). A petition for rehearing was denied on March 27, 1962 (R. 2033). Mr. Justice Black extended the time for the filing of a petition for a writ of certiorari to May 25, 1962, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioners' convictions for mail fraud and for the fraudulent sale of securities by use of the mails.

2. Whether petitioners had a fair trial.

STATUTE AND RULE INVOLVED

Section 17(a) of the Securities Exchange Act of 1933, 48 Stat. 84, as amended, 15 U.S.C. 77q(a), provides in pertinent part:

> It shall be unlawful for any person in the offer or sale of any securities * * * by the the use of the mails, directly or indirectly—
>
> (1) to employ any device, scheme, or artifice to defraud, or
>
> * * * * *

Section 1341 of Title 18, U.S.C., provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Rule 21, F. R. Crim. P., provides in pertinent part:

> (a) The court upon motion of the defendant shall transfer the proceeding as to him to another district or division if the court is satisfied that there exists in the district or division where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial in that district or division.
>
> (b) The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged.

STATEMENT

A 20-count indictment returned in the United States District Court for the Northern District of Alabama charged petitioners and others with mail fraud and use of the mails in the fraudulent sale of securities, in violation of 15 U.S.C. 77q(a) and 18 U.S.C. 1341, *supra* (R. 12–43). After a trial by jury, petitioners were found guilty on 19 counts (R. 1930–1931, 1937). Greenhill and Proctor were sentenced to imprisonment for three and two years, respectively (R. 1934–1935, 1969–1972).[1] The convictions were affirmed on appeal (Pet. App. 1–14).

[1] Greenhill was sentenced to concurrent terms of imprisonment of two years on each of nine counts and to concurrent terms of imprisonment of one year on each of ten counts, with

The underlying scheme charged involved a reckless corporate acquisition program by Alabama Acceptance Corporation, which would then "milk" its new subsidiaries and ultimately pass on the proceeds to the defendants for their own personal benefit. The essence of the offenses here, however, is that, while the economic and financial position of Alabama Acceptance was, as they knew, steadily deteriorating to the point of bankruptcy, the defendants, using the mails, falsely represented its position in order to induce the public to invest in its securities (R. 12–43).

1. THE PROGRAM OF CORPORATE ACQUISITIONS FROM 1956 TO 1958

In March 1956, co-defendant John Murray acquired a controlling interest in the capital stock of the Alabama Acceptance Corporation, an Alabama corporation engaged in the business of discounting automobile paper with its main office in Birmingham, Alabama (R. 126–131, 132, 134–136, 407, 592, 605, 618–620). Murray became president of the company and held the office until March, 1958, when he filed voluntary bankruptcy proceedings for the corporation (R. 143, 209, 407, 588–589, 1105, 1170–1172). During this period, co-defendants William Faulk and Carle Wells were employed as securities salesmen for Alabama Acceptance.

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the one-year terms to run consecutively to the two-year terms (R. 1934–1935, 1970–1972). Proctor was sentenced to concurrent terms of imprisonment of one year on each of nine counts and to concurrent terms of imprisonment of one year on each of the remaining ten counts, with the one-year terms on the ten counts to run consecutively to the terms imposed on the first nine counts (R. 1935, 1969–1970).

The petitioners were associated in a financial consulting and industrial brokerage business in New York City under the name of Frank Proctor & Associates. Greenhill was an attorney and financial consultant; Proctor was an engineer and an industrial broker who would bring buyers and sellers of businesses together (R. 1551–1553, 1813, 1815–1816, 1854).

In June 1956, Murray and one Norman Williams, an accountant for Alabama Acceptance, sought the advice of Greenhill in New York regarding the operations of Alabama Acceptance (R. 428–431, 627–629, 679–680, 1554–1557). Greenhill was given a copy of Alabama Acceptance's financial statement for the eight month period ending February 29, 1956. This report showed that Alabama had an operating loss of about $44,900, an earned surplus of $68.85, and a net worth including capital stock of about $162,800 (R. 408–413, 422, 428–429, 1557–1558, 1623, 1703; see R. 609–612). Greenhill said that he could not be of any assistance in the finance business, but that a corporate merger and acquisition program would be helpful to Alabama Acceptance (R. 431–437, 1560–1561, 1710). He was not "particularly concerned" about the liability picture of Alabama Acceptance, but only with the amount of money that could be obtained from its assets for corporate acquisition (R. 433–434).

On July 17, 1956, an agreement was entered into between petitioners, Frank Proctor & Associates, Roland Industries (a corporation owned by petitioners and Greenhill's wife) and Alabama Acceptance whereby, for a three year period, Greenhill,

Associates and Roland Industries would submit to Alabama Acceptance "proposals and deals involving acquisitions and mergers." The submitting parties were to receive a 5% commission when a proposal was accepted and closed (R. 229–232, 1567–1568, 1712–1713, 1717). The agreement was subsequently amended to provide for the retention by Alabama Acceptance of Associates to assist in the diversification program and on financial matters, and to manage all corporations owned or to be acquired by Alabama Acceptance during the period of agreement (R. 228, 232–233, 1613–1616). Proctor was to devote his full time to the services of Alabama Acceptance, Alabama Acceptance would pay Associates another 5% of the purchase price of acquired corporations plus $100 per week for each subsidiary corporation and 25% of its net profits before taxes as shown on its consolidated balance sheets (R. 234–236, 1613–1616).

In 1957, petitioners and Murray agreed that each was to own 33⅓% of all corporations formed since June 18, 1956, including Frank Proctor & Associates (R. 238–240, 1620, 1715; see R. 565), and each was to be employed for a period of ten years, with Greenhill to receive a salary of $50,000 per year and Proctor and Murray each to receive a salary of $25,000 per year (R. 238–240, 1620, 1715–1716). The agreement was dated back to June 18, 1956 (R. 238).

From July, 1956 to late 1957, Alabama Acceptance acquired either the assets or controlling stock interests in a wide variety of corporate enterprises (R. 552–555, 558–564, 597, 601–602, 653–657, 661–662, 683–684, 700, 716–719, 759–760, 1215–1220, 1354–

1360, 1378–1382, 1385–1388, 1395–1401, 1405–1415, 1418–1424, 1439–1443, 1481–1482, 1571–1574, 1584–1590, 1592–1596, 1600–1603, 1616, 1722–1723, 1733–1734, 1738–1741, 1823–1830, 1836–1839, 1854–1856, 1857–1859). In most instances, Alabama Acceptance made a relatively small down payment on the purchase price, and committed itself through mortgages and notes for the balance (E.g., R. 1354–1359). Fees and commissions for brokerage and management services were paid by Alabama Acceptance and its subsidiaries to petitioners and Associates, and, on one occasion, Greenhill and Associates received about $20,000 from Alabama Acceptance despite the fact that the particular acquisition for which the payments were made did not materialize (R. 442, 445–446, 456, 459, 474–475, 523–533, 541–542, 547–549, 552–553, 564, 636, 644–646, 657–658, 662, 749–750, 763–764, 1276–1277, 1286–1289, 1291, 1340–1347, 1359, 1370, 1489, 1711, 1717, 1728–1731, 1737, 1856; see R. 1473–1474, 1685, 1711–1713). Alabama Acceptance, through Murray and Proctor, who was a director and the vice-president of Alabama Acceptance from July 16, 1956, to December 31, 1957, assumed control of the subsidiaries and engaged in their management (R. 213, 220–222, 684–685, 1105, 1171–1172, 1481–1482, 1488–1489, 1492, 1527–1529, 1530, 1535, 1574, 1585, 1591–1592, 1595–1596, 1603, 1822–1823, 1854). To a lesser extent, Greenhill also participated in the management of the subsidiaries (R. 1481–1482, 1492, 1527–1528). One subsidiary paid Associates a management fee of $1,250 per month (R. 1489).

Some of the acquired corporations had large operating losses at the time of acquisition by Alabama Acceptance; others showed substantial profits up to the time of acquisition but lost money thereafter (R. 1371, 1391–1392, 1447–1448, 1450, 1452, 1486, 1490, 1520, 1524–1525, 1530, 1723, 1738, 1805–1806, 1860–1861). For example, the Century Controls Corporation complex (which included a holding company and operating companies) showed an operating deficit of about $467,000 at the time of its acquisition (R. 1223–1228, 1314–1316, 1402–1415, 1447–1448, 1586–1590) and subsequently went into receivership (R. 1449–1450). Another company, the Troop Water Heater Company of Pennsylvania, had a "cash position" in 1956 of $100,000 (R. 1486, 1490). After petitioners and Murray became active in the management, Troop, at the direction of either Greenhill or Proctor, loaned Alabama Acceptance and its affiliates about $270,000 (R. 1487, 1492, 1736, 1775–1776, 1782–1788; see R. 1687–1688), and Alabama Acceptance sold Troop's operating properties for about $100,000 (R. 1487–1490). Troop paid Associates a management fee of $1,250 per month (R. 1487–1488). A receiver was appointed for Troop in July 1958 (R. 185, 1482–1484). Still another company, the Hall Lithographing Company of Kansas, which was acquired in December, 1956, had been operating a "profitable" business before acquisition (R. 1519–1521, 1524–1525, 1530), but operated at a loss thereafter. In 1957, it was sold by Alabama Acceptance to two individuals in Topeka, Kansas (R. 1524–1533). The books of Alabama Acceptance, however, never indicated that

Hall Lithographing had been sold (R. 567–569, 675–676).

2. THE FINANCIAL POSITION OF ALABAMA ACCEPTANCE

For the period ending August 31, 1956, the balance sheet of Alabama Acceptance showed an overdraft of $15,000 (R. 636–637). On instructions from Murray, Williams (an accountant for Alabama Acceptance) prepared another balance sheet which showed a cash balance of $30,000, a result arrived at by ignoring checks for $45,000 already issued by Alabama Acceptance but not yet cashed (R. 637–638, 744–745).

By December 31, 1956, the consolidated financial statement of Alabama Acceptance showed an operating deficit of $115,000 and a "net worth" of $575,846 (R. 489–490, 494–495). Included in the "net worth" figure were $74,000 worth of "bad debts" as assets and $464,804 "write-up" of assets (termed "surplus from appraisals") (R. 511–513). At this time, Alabama Acceptance was carrying over $100,000 of past due debts as assets (R. 495).

In April, 1957, Alabama Acceptance paid "dividends" of $8,140 to noteholders although the books reflected no earnings and a deficit in earned surplus of about $63,900 (R. 497–500). The books did not reflect a $60,000 debt to a New York bank (R. 500, 665).

In October 1957, a certified public accountant made a special examination of the books of account of Alabama Acceptance as of August 31, 1957. The financial report, which was mailed to Greenhill, indicated that Alabama Acceptance had a deficit in the surplus

account of $328,000 and a net worth of $166,000 in the red (R. 1113-1117, 1145). The cash receipts and general ledger of Alabama Acceptance were "out of balance," and it was difficult for the accountant to obtain information (R. 1126–1127, 1133, 1135–1136). The cash representing loan balances had been reconciled at the end of each month, and when the accountant asked for the adding machine tapes he was informed that they had been thrown away (R. 1130). Some receivables were not listed (R. 1140–1141). About sixty-four per cent of the receivables were "past due or bad." Included in this amount was $74,000 which had been previously written off as bad debts but which had been restored, at the direction of Murray, to the books as assets (R. 622–624, 639–640, 1144–1145).[2]

In January, 1958, Alabama Acceptance sold five of its subsidiaries for 2,000,000 shares of Cornucopia Gold Mines, Inc., which were to be issued in the future (R. 683–684, 700, 1214–1216, 1246, 1249, 1254–1255, 1482, 1660–1669, 1723–1724, 1764–1766). Greenhill had told the others that this would solve their financial difficulties (R. 501–503). The books of Cornucopia showed, as of June 30, 1957, an income of $1,774 and a net loss of $14,378 (R. 1258; Pet. App. 9a). It had current assets of $1,415 and certain gold mining and uranium properties (R. 1237; Pet. App.

[2] The books of Frank Proctor & Associates reflected that Associates had paid out $38,600 to subsidiaries of Alabama Acceptance, and that Alabama Acceptance owed Associates that amount of money (R. 735). But the books of Alabama Acceptance contained no corresponding entries to indicate that that amount was owed to Associates (R. 736–737).

9a). Cornucopia never issued the 2,000,000 shares in question, and the books of Alabama Acceptance never showed any interest in Cornucopia (R. 515, 1672–1674, 1723–1724, 1766). The board of directors of Cornucopia subsequently resigned, and in July, 1958, Cornucopia went into bankruptcy (R. 1245, 1259, 1766). Notes of Alabama Acceptance were, however, sold with the representation that they were secured by Cornucopia stock (R. 801–803, 1011–1013; see R. 503, 698.)

In March, 1958, Murray filed a voluntary petition in bankruptcy for Alabama Acceptance, and on May 9, 1958, Alabama Acceptance was adjudicated bankrupt (R. 143, 158, 183, 222). Total liabilities of Alabama Acceptance equaled about $1,100,000; assets totaled about $84,000, of which about $53,900 represented past due debts, and 3,030 shares of the Auto Discount Company (R. 155, 163–166, 167, 172–176). The Auto Discount Company stock was not recorded in the books of Alabama Acceptance (R. 174). Included in the $84,000 asset figure were notes from Greenhill and Murray for about $5,000 each due Alabama Acceptance (R. 166–167). As of the time of trial in April, 1960, the trustee in bankruptcy had collected only about $25,600 (which included collections by the co-receiver) (R. 219).

Throughout the corporate acquisition program of Alabama Acceptance, Frank Proctor & Associates received brokerage and management fees from Alabama Acceptance or its subsidiaries (R. 523–526, 530, 533, 541–542, 547–549, 552–553, 645–646, 658, 662, 749–750, 763–764, 1276, 1286, 1289, 1291, 1359,

1370, 1495–1496, 1607, 1728, 1737, 1856–1859. Money obtained by Associates was paid out to the petitioners in salaries, expense accounts and loans (R. 573–574, 1177, 1308–1309, 1310, 1497–1498, 1509, 1510–1511, 1751, 1845–1848). The books of Associates showed that, as of May 30, 1958, Greenhill had unpaid loans of about $30,000 while Proctor had unpaid loans of about $15,000 (R. 1509–1511, 1849). Forty percent of Greenhill's Florida expenses were paid for by Associates (R. 1751) and another 40% were paid by Alabama Acceptance. In addition, Alabama Acceptance made direct payments to petitioners and loaned Greenhill about $5,000 which was never repaid (R. 164–166, 442, 445–446, 456, 459, 474–475, 530–533, 547–549, 552–553, 564, 636, 644, 652, 657–658, 662, 1277, 1286–1289, 1711, 1717, 1751; see R. 1473–1474, 1685, 1711–1713, 1717, 1728).[4]

Throughout 1956 and 1957, Alabama Acceptance solicited investments through advertising in Alabama and Florida newspapers (R. 281–282, 311, 771, 787–788, 809–810, 828, 885, 934, 997–999, 1008, 1020, 1079–1080, 1842–1846). A typical advertisement (appearing

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[3] In early 1957, petitioners moved their "modest" offices in New York City from Broadway overlooking Times Square to a suite of offices on Madison Avenue (R. 430–431, 516–520). In the Madison Avenue suite, each petitioner had a "large" office; there was a large reception room and a kitchenette; and there were other offices (R. 516–520). All of the offices were "elaborately furnished" (R. 520).

[4] Greenhill made a number of trips to the Miami area of Florida, where Faulk solicited investments on behalf of Alabama Acceptance, and ran up hotel bills in substantial amounts at the Eden Roc Hotel, the Americana Hotel and the Fontainebleau (R. 1751–1754, 1776–1780).

in the *Birmingham News* of August 18, 1957) read as follows (R. 1080):

> Our business is putting money to work, eight per cent debenture bonds. Interest is the cost of doing business. Our income taxes are fifty-two per cent.

Petitioners made four or five trips to Alabama from 1956 to 1958 (R. 577–580, 632, 703, 711–712, 1156–1157, 1643, 1821). Proctor either "wrote up" or approved advertising materials for Alabama Acceptance during this period (R. 582–583, 842–843, 1862–1863; see R. 1842–1846, 1871–1874).

3. THE FRAUDULENT REPRESENTATIONS

From 1956 to early 1958, Alabama Acceptance solicited money from the general public for investment in 7 to 10% promissory notes and debentures of Alabama Acceptance. Wells operated as a securities saleman in Alabama while Faulk conducted sales operations in Florida. The investing public were made aware of opportunities for investment in Alabama Acceptance through use of the mails, advertising in Alabama and Florida newspapers and by word of mouth from Wells, Faulk and Murray. The government called twenty-one investors as witnesses who testified that, at intervals between 1956 and February 1958, they invested and reinvested sums of money between $50.00 and $25,000 in notes and debentures of Alabama Acceptance (R. 242–249, 265–266, 274, 276–277, 290–291, 305–306, 355–356, 358, 365–367, 369–370, 373–376, 382, 385, 388–389, 391, 402–403, 766–767, 772–775, 779–780, 782–784, 814, 817, 820, 833, 835, 844, 848–

857, 876–877, 881, 892–893, 901–905, 914–918, 921–922, 925, 928–930, 931–933, 938–939, 943–945, 952–953, 1007, 1009–1010, 1013, 1016–1017, 1093–1094, 1098, 1106–1107, 1109, 1153–1154, 1159, 1163–1164, 1167, 1169).

In its advertising program, Alabama Acceptance utilized a pamphlet entitled, "Alabama Acceptance Corporation—A Story of Interest." The pamphlet was printed in December 1956, and all of the information contained therein came from the petitioners (R. 839–843, 959–974, 979, 988; see R. 1646–1652, 1746–1750, 1780–1785, 1845–1846, 1866–1868). The pamphlet, which was handed or mailed to prospective as well as present investors (see *e.g.*, R. 864–865, 1020–1021, 1084–1085, 1095, 1100), recited that, as of January 1957, the "working capital" of Alabama Acceptance was in excess of $800,000 and its net worth was in excess of $600,000 (R. 1648–1649).

In October 1956, one investor received a circular through the mail which indicated that Alabama Acceptance had assets of $1,777,000 in 1955 (R. 768, 771). By letter of May 1957, another investor was informed that the capital and surplus of Alabama Acceptance at that time was in excess of $600,000, and that the safety of the proposed investment would be "controlled specifically by placing [it] in the same category as banks and financial institutions, thereby keeping [the] investment protected by a subordinated debenture issue" (R. 793, 794–196). In July 1957, an investor was told that Alabama Acceptance was making "good progress" in its business, and that an old couple had invested their life savings and were now living off their dividends (R. 778, 781). By

letter of January 1957, another investor was told that investments in Alabama Acceptance were secured by "seasoned automobile paper" (R. 812). This investor was subsequently informed by letter that Alabama Acceptance had increased its assets to $2,500,000 and net worth to more than $750,000 (R. 819). In March or April 1957, another investor was told that Alabama Acceptance had a net worth of $600,000 as of January 1957, that Alabama Acceptance made 16% on automobile paper, and that the company was in a high income tax bracket (R. 829–832). Another investor received a letter in early 1957 saying that the investments of Alabama Acceptance were regulated by the Securities Commission of Alabama, and that Alabama Acceptance paid federal income taxes of 52% (R. 870–871). Another investor was told that Alabama Acceptance was in a "very high income tax bracket", and that its interest costs therefore would be only about 4% (R. 885–886, 912–914). In January 1958, Wells told an investor that Alabama Acceptance was "doing fine", that it was purchasing "home appliances, stoves and refrigerators by the carload" (R. 853–855). In February 1958—one month before Alabama Acceptance went into bankruptcy—Murray told an investor that Alabama Acceptance did not carry government insurance on its investments, but that Alabama Acceptance was "as safe as anyone" and had never missed a single dividend (R. 934–936).

4. GOVERNMENT EXHIBIT NO. 62

Williams testified that he prepared Government Exhibit No. 62 from the books and records of the

Alabama Acceptance Corporation, and that it represented a summary or schedule of checks written by Alabama Acceptance from June 19, 1956, through December 31, 1957, in connection with its corporate acquisition and merger program (R. 521–522, 527). The schedule indicated that Alabama had written checks totaling $502,939 on the acquisition program (R. 529). Out of this figure, Greenhill received $23,726, of which $5,000 represented a loan from Alabama Acceptance; Associates received $53,787; and Murray received $9,050 (R. 529–530). Williams said that the schedule did not reflect $98,000 worth of checks drawn on a Pittsburgh bank for Greenhill, and $16,618 worth of checks drawn on that bank for Associates (R. 530–533).

Benjamin Markowe, a certified public accountant, testified for the defense that he examined Government Exhibit No. 62 and the books of Alabama Acceptance (R. 1271–1272), and that the exhibit contained numerous items which were properly chargeable to other accounts or payments (R. 1273–1274). He said that loans to Greenhill, advances to Murray, interest on loans, financing and legal fees, and other items, all of which totaled about $166,000, were improperly included in the $502,000 figure (R. 1274–1280, 1284). This left a balance invested in subsidiaries of about $346,572 (R. 1283), of which $298,000 was paid directly for investments (R. 1285, 1288). He said that the books of Alabama Acceptance were "poorly kept and inadequate as to disclosure of fact information", that there were errors and omissions, and that there was a "lack of complete informa-

tion insofar as these various organizations were concerned" (R. 1293).

On cross-examination, Mr. Markowe testified that of the $83,860 repayment of loans included in the $502,000 figure, there was repayment of a $42,000 loan to a Mr. Shakerinn, and that Alabama Acceptance had made repayments on loans from the Troop Water Heater Company (R. 1295–1299; see R. 1271, 1274). He testified, however, that he did not know whether Alabama Acceptance used the $42,000 loan from Mr. Shakerinn or the loans from the Troop Water Heater Company in the acquisition program (R. 1296–1300). He said that $5,000 constituted a loan repayment to a Mr. Jacobs, who formerly owned the Troop Water Heater Company; that he did not know what Alabama Acceptance did with the money borrowed from Mr. Jacobs; and that money came from Troop and went back to Troop—"sort of a current account" (R. 1300–1303, 1317–1318). Williams testified that Alabama Acceptance borrowed money from the Troop Water Heater Company in order to pay Mr. Jacobs who owned Troop (R. 718–719; see R. 1487, 1492, 1736, 1775).

ARGUMENT

1. Considering the evidence which the government did produce, summarized in the Statement, *supra*, there is no basis for the suggestion that the verdict could only have been the result of hostility. It may be that all of the financial machinations were not proved in every final detail, in large part because the

books were not properly kept,[5] but unquestionably there was ample evidence to show that Alabama Acceptance, with active stimulation and co-operation by the petitioners, sold notes and debentures to the public through false and misleading representations and that the mails were used in the process. That is all that had to be shown to prove guilt.

Petitioners' endeavor to attach great importance to Government Ex. 62, which, they say, was not prepared in accordance with precise accounting standards. But this was not the fault of the government. Petitioners cannot complain of lack of precision caused by their own failure to maintain complete and accurate records. *Bowen* v. *United States*, 153 F. 2d 747, 751 (C.A. 8), certiorari denied, 328 U.S. 835; *Brady* v. *United States*, 26 F. 2d 400, 402 (C.A. 9), certiorari denied, 278 U.S. 621. There was no obscurity about the fact that they grossly overreached the investing public.

Williams testified that he prepared this exhibit from the books and records of Alabama Acceptance, and that it represented a schedule or summary of checks written by Alabama Acceptance, between June 1956 and December 1957 on its corporate acquisition program (R. 521–522, 527). The schedule indicated

[5] Three accountants who had access to the books and records of Alabama Acceptance and/or the books and records of Frank Proctor & Associates, Roland Industries, Alabama Industries, Allen Capital Corporation, and Greenhill testified that the books were poorly kept and inaccurate, and that there were substantial omissions (See, *e.g.*, R. 536–537, 539, 622–624, 639–640, 710, 736–737, 751, 753–755, 1126–1127, 1140–1141, 1144–1145, 1293, 1296–1303, 1317–1318, 1494–1500, 1502–1505, 1507).

that, of the total amount of $502,939 spent on this program, there were checks of $23,726 payable to Greenhill and checks of $53,787 payable to Frank Proctor & Associates (R. 529–530). This disposes of the complaint (Pet. 9–10) that the exhibit left the "impression" that "the remainder of nearly $500,000 went to petitioners and their cohorts." The mere fact that an accountant witness for the defense was able to conclude that certain checks should not have been included in the summary—for example, the repayment of loans, assuming Alabama Acceptance had not used the money it borrowed in its acquisition program—did not detract from the *admissibility* of the exhibit; it would at best affect the *weight* of the exhibit. *Rudin* v. *United States*, 254 F. 2d 45, 49 (C.A. 6), certiorari denied, 357 U.S. 930.

2. By lumping together several different issues and discussing them in general terms, petitioners seek to convey the impression that they were denied a fair trial. A careful examination of the record shows that the contentions are without foundation.

a. Change of Venue. Petitioners do not directly challenge the denial of their motion for a change of venue, although they rely on the allegations in that motion that hostility had been engendered against them. The record shows that the publicity complained of, which was never detailed, occurred at about the time of the bankruptcy of Alabama Acceptance in March 1958 (See R. 58–59, 61–62, 99). The indictment was returned in the district court on September 4, 1959 (R. 12); the trial was originally set for February 2, 1960; and it did not actually begin until April

1960, having been postponed on the motion of Greenhill so that he would have time to examine records which the court ordered produced for inspection and discovery (See R. 63–65, 71). There is no showing of any great publicity at the time of trial. Indeed, neither in January 1960, when Greenhill moved for the continuance, which was granted, nor in March, when he unsuccessfully moved for a further continuance beyond April 14 did he ground the application upon alleged adverse publicity (R. 65–69, 71–81, 101–105, 108–114). No showing was made on the *voir dire* examination of the jury that any juror had been affected by adverse publicity regarding the case. At the beginning of trial, petitioner sought to have the jury sequestered, claiming that "publicity * * * *is going to be given* to the case in newspapers and on radio and television" (R. 100, emphasis added). The court admonished the jury throughout the trial that they were not to discuss the case and not to read or listen to any newspaper reports or television or radio coverage of the case (R. 177, 397, 603, 837, 1014, 1083, 1184, 1282, 1930).

The denial of the motion to change venue to New York under Rule 21(b), F.R. Crim. P., was clearly proper. The indictment indicated that most of the transactions alleged had occurred in Alabama; that all of the letters and advertising materials sent to investors were mailed from Alabama; that most of the letters and advertising materials alleged to have been mailed from Alabama were received by Alabama investors, and

that only one letter (count 7) was addressed to a New York investor (R. 12–43). There was no jurisdiction in New York to try 19 counts of the indictment since the mailings alleged in those counts (all but count 7) neither originated nor terminated within the Southern District of New York (R. 12–43). *United States* v. *Choate*, 276 F. 2d 724 (C.A. 5). The books and records of Alabama Acceptance, including all of the records and proceedings in the bankruptcy court, were in Alabama (see R. 71, 112). Greenhill was the only defendant who was not an Alabama resident (R. 56–57). Murray and the co-defendant salesmen did not enter pleas of *nolo contendere* until the day of trial (R. 114–118).

The court ordered that witnesses for the defense be subpoenaed at government expense and that the government make available to petitioners for inspection all records in the case (except work products of government attorneys and agents). Petitioners were also assured reasonable time and opportunity to interview their witnesses (R. 70–71, 93–95, 96, 104, 109, 112). And the court announced it would permit petitioners to subpoena witnesses during the trial (R. 104). Nor were these empty promises. While the trial was in progress, the court allowed the petitioners ample opportunities to interview witnesses, examine documents and the like (see *e.g.*, R. 1460–1461).

b. Government witnesses. The government called twenty-one investors as witnesses. One investor was 78 years of age, and another was blind (R. 1016, 1163–1170). One testified that he paid for his invest-

ment, out of life insurance proceeds received upon the death of his son (R. 1007, 1009); another testified that he used cash savings for his investment (R. 844, 853); and another testified that she used social security checks to pay for the investment (R. 931, 933). Most of the investors did not describe the source of the money used in the investments in question. It was petitioners' own acts which made these people available as witnesses to the fraud. It is too late to regret their choice of victims.

c. Government testimony. The charge that the government unnecessarily portrayed the petitioners as "big city operators from New York", and elicited irrelevant testimony concerning Greenhill's Florida expenses is unjustified. The evidence showed that petitioners were direct beneficiaries of funds from Alabama Acceptance and its subsidiaries, either through payments made to Frank Proctor & Associates which funneled down to the petitioners in the form of large salaries, loans and expense accounts, or through payments made directly to them. See the Statement, *supra.* Concurrently, petitioners moved their "modest" Broadway offices to a large suite of "elaborately furnished" offices on Madison Avenue. Greenhill, at least, enjoyed a high standard of hotel living while in Florida. That was relevant corroborative evidence. Apparently, petitioners considered themselves to be "big city operators". Certainly they cannot complain because the evidence of their conduct made them so appear.

CONCLUSION

For the reasons set forth, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 145

KALMAN GREENHILL and FRANK PROCTOR, *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION TO VACATE AND REMAND

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MOTION TO VACATE AND REMAND

Come now the petitioners in the above-entitled proceeding and move this Court for an order vacating the judgment below and remanding the case either (1) to the District Court with directions to grant petitioners a new trial in which all the proceedings are recorded and transcribed in accordance with the Court Reporter Act, 28 U.S.C.A. § 753(b), or (2) to the Court of Appeals for reconsideration in light of the Court Reporter Act, 28 U.S.C.A. § 753(b), and that court's decision in

Stephens v. *United States*, 289 F. 2d 308 (C.A. 5). As grounds for this motion, petitioners state as follows:

1. On May 25, 1962, petitioners herein filed a petition for a writ of certiorari, seeking review of the judgment of the Court of Appeals affirming their convictions for violations of the federal mail fraud and securities fraud statutes. The question presented for review in that petition (p. 2) was stated as follows:

> Whether a federal court conviction for fraud is consistent with that regularity and fairness which which should characterize the administration of justice in the federal courts where (1) the trial is conducted in an atmosphere of hostility and prejudice, and (2) the inadequacies of proof and explanation of complex financial transactions involved in the prosecution make the jury verdict untrustworthy and subject to the influences of hostility and prejudice.

2. Basic to that question is an appreciation of the entire atmosphere of the trial (which took place in the Northern District of Alabama) and particularly of those elements which expressed the hostility and prejudice directed toward the petitioners—described in the petition as efforts "by Government counsel to portray petitioners as rich big-city operators from New York who had bilked helpless Alabama citizens of their life savings." Pet., p. 7. Petitioners' geographical origins were emphasized and reiterated. And in this respect, petitioners assert that the critical factor exhibiting such geographical hostility and prejudice was contained in the final argument of the prosecutor to the jury, to which reference was made in the petition, pp. 7, 12. And it is that factor which underlies the question presented for review both in the court below and before this Court. To understand that ques-

tion and to resolve it properly requires an evaluation of the prosecutor's final summation to the jury. See *Malinski* v. *New York*, 324 U.S. 401, 433-434 (Murphy, J., dissenting in part).

3. Counsel for the petitioners on the appeal below and before this Court, who were not counsel at the trial, assumed that the complete transcript of the trial —including the summations to the jury—was available in support of the issue of hostility and prejudice. But when seeking to quote and analyze the prosecutor's summation, they discovered that the summation was not a part of the certified record. That transcript, which is on file with the Clerk of this Court, is composed of seven volumes, containing nearly 2000 pages. In Volume 7, page 1886, there appears the following:

> The Court: All right. Are you ready, Mr. Longshore?
>
> Mr. Longshore [the United States Attorney]: Yes, sir.
>
> The Court: Call in the jury then.
>
> (The jury returned to the courtroom and arguments were presented by respective counsel, at the conclusion of which an adjournment was taken until 9:00 o'clock A.M. the following morning, Saturday, April 30, 1960.)

Moreover, except for two sentences of the prosecutor's opening statement, to which an exception was sustained, the opening statements of various counsel are not contained in the certified trial transcript. See Volume 1, pp. 119-120.

4. Counsel, who assumed that the summations had been taken down by the court reporter (as required by

the Court Reporter Act, 28 U.S.C.A. § 753(b)) but not transcribed, then sought to obtain a transcription of those summations as a supplement to the certified record before this Court. But counsel then discovered that the court reporter had never recorded any portion of these final arguments. As stated in an affidavit of the reporter, Mr. A. B. Hale, which affidavit is on file with the Clerk of this Court and reproduced in full in the appendix hereto (p. 1a, *infra*):

> The closing arguments and final summation of counsel representing both the United States Government and the defendant were made in this cause. Affiant did not record any portion of the final argument of either counsel because it was his custom not to take down any such arguments. Affiant knows of no agreement made by counsel to the effect that this argument should not be recorded, but to the contrary affiant merely followed what had come to be his usual custom relative to not recording final arguments of counsel. No other court reporter was present during the trial of this cause.

5. In an effort to reconstruct the prejudicial factor contained in the prosecutor's summation, petitioners and their trial counsel have submitted affidavits as to their best recollection of what the prosecutor said. Those affidavits are on file with the Clerk of this Court and are reproduced in the appendix hereto. In pertinent part, these affidavits state:

AFFIDAVIT OF PETITIONER GREENHILL

> During the course of this summation Mr. Longshore upon many occasions, possibly as many as ten or fifteen occasions, referred to the fact that I came from the City of New York, that I had conducted my business in the City of New York and

was not familiar with the practices and the ethics and character of a southern city and a southern community. Mr. Longshore made reference to the fact that the business of both Mr. Proctor and myself was conducted in a highly extravagant and luxurious operation in a "big city."

I further respectfully recall continuous reference to the fact that Mr. Norman Williams was an accountant who lived and practiced in Birmingham, Alabama, who was a local citizen whose word could be taken at face value, and they would have to give more weight to his testimony than that of lawyers and certified public accountants who lived and practiced in the City of New York.

I further recall that upon many occasions and particularly towards the tail end of Mr. Longshore's summation, he referred to the fact that "these northerners" went to the South and particularly to Birmingham, Alabama, and thought they could easily deceive and hoodwink the "South" and its residents and inhabitants.

. . . . I respectfully submit that the major portion and the greater part of Mr. Longshore's summation dealt with "the South against the North" and continuous references in a similar vein.

AFFIDAVIT OF PETITIONER PROCTOR

Constant repetition was made of the fact that funds flowed from the South to the North and particularly over and over the phrase "these New Yorkers" or "these men from New York" was used.

I recall that reference was made several times in the summation to the fact that these New Yorkers came to Birmingham to do business with these witnesses. Reference was also made in the

summation to the New York offices that we have and the New York way of doing business.

A specific phrase recalled was one concerning Norman Williams, the accountant. The phrase was "We know Norman Williams and we believe what he says." . . .

The close of the summation was again devoted to the fact of the New Yorkers who had come into Birmingham and reference was made concerning New York witnesses and that accountants and lawyers had all been New Yorkers. . . .

AFFIDAVIT OF KARL B. FRIEDMAN, TRIAL COUNSEL

. . . During the course of the summation by Mr. Longshore, Mr. Greenhill and I had brief conversations in which we were both considerably disturbed by the continued references of Mr. Longshore to the fact that these people had come down from the north to take the money from the people in the south and that they had taken the money back up north and that nothing ever came south again. I remember some specific references to the fact that the offices of Frank Proctor and Associates in New York were very plush and elaborate like some fancy penthouse up in New York City. It seemed to me that the entire emphasis on the argument by Mr. Longshore was aimed at prejudicing the minds of the jury against Mr. Proctor and Mr. Greenhill because they came from New York.

6. It is thus indisputable that the court reporter never took down or recorded any portion of the prosecutor's final summation to the jury. And it is equally clear that the petitioners and their counsel never agreed or authorized the reporter not to record this summa-

tion. See also affidavit to that effect by L. Drew Redden, another trial counsel.

7. The failure of the reporter to record this summation, which he admits was due solely to "his usual custom", was in direct violation of the Court Reporter Act, 28 U.S.C.A. § 753(b), which provides in pertinent part:

> One of the reporters appointed for each such court shall attend at each session of the court and at every other proceeding designated by rule or order of court or by one of the judges, and shall record verbatim by shorthand or by mechanical means: (1) all proceedings in criminal cases had in open court; * * *

The mandatory nature of this statutory command was emphasized by the Court of Appeals for the Fifth Circuit in *Stephens* v. *United States,* 289 F. 2d 308, 309, where it was held to be reversible error requiring a new trial for the court reporter to fail "to record certain proceedings had in open court, mainly, the examination of the veniremen *and the arguments of counsel to the jury.*" [Emphasis added.] In the words of the court, p. 309:

> Since the failure of the court reporter to observe the terms of the statute is undisputed and the result is that a full transcript is not available to us, we do not see how we can, under Rule 52(a), F.R. Cr. P., 18 U.S.C.A., adjudicate that there was no showing that any errors which might have been reflected by the transcript were harmless. This conclusion seems to be in line with whatever jurisprudence is available on the subject. [Citation was here made in a footnote to *Bruno* v. *United States,* 308 U.S. 287, and *Stansbury* v. *United States,* 219 F. 2d 165, 169 (C.A. 5)].

Moreover, in *Poole* v. *United States*, 250 F. 2d 396, 399, the Court of Appeals for the District of Columbia Circuit referred to the Court Reporter Act as imposing an unequivocal duty on the reporter to transcribe and certify in *every* criminal case the proceedings in open court; it further said that it is the "duty of the District Court to see that henceforth the court reporters comply with the provisions of 28 U.S.C. §753 (1952), in accordance with the unequivocal congressional intent." See also *Miller* v. *United States*, 317 U.S. 192, emphasizing the need for a verbatim record of all court proceedings, particularly in criminal cases.

8. The unwarranted violation of the Court Reporter Act has resulted in the absence of the complete record necessary to a fair and proper adjudication of petitioners' appeal from their convictions. As was the situation in the *Poole* case, neither the Court of Appeals nor even this Court can adjudicate the claimed errors growing out of the prosecutor's summation; nor can there be any determination whether any errors that might have been made in that summation were of the non-harmless variety within the meaning of Rule 52(a), F.R. Cr. P. The result is that the basic question presented for decision in the court below and in this Court cannot be intelligently resolved. Thus the entire appellate process open to these petitioners has been frustrated by the court reporter's illegal failure to record the summation.

9. From what has been indicated in the efforts to reconstruct the prosecutor's summation, errors have occurred herein whereby—in the setting of this case—it could well be concluded that the prosecutor had struck "foul blows" of geographic hostility "calculated to produce a wrongful conviction." See

Berger v. *United States*, 295 U.S. 78, 88. As was said in *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 239, "appeals to class prejudice are highly improper and cannot be condoned." So too as to geographic prejudice. Such improper conduct, of course, sometimes occurs in the course of a final summation to a jury and, when it does, courts have uniformly condemned and struck it down. See *New York Central R. Co.* v. *Johnson*, 279 U.S. 310; *United States* v. *Spangelet*, 258 F. 2d 338, 342-343 (C.A. 2); *United States* v. *Stromberg*, 268 F. 2d 256, 271 (C.A. 2); *Wallace* v. *United States*, 281 F. 2d 656, 667 (C.A. 4). And in view of the *prima facie* evidence of the geographical hostility exhibited in the summation, the nonexistence of prejudice flowing from the prosecutor's improper conduct cannot here be assumed. *Berger* v. *United States, supra.*

10. Petitioners submit that the claimed error in the prosecutor's summation infects the fairness of the trial. And because the fairness of the trial is the basic point in issue, this appeal cannot properly be resolved with a non-complete record. Even in those instances where alleged unfairness has been found to be unsustained by the record, the entire or relevant portions of the record have been available in order to make that judgment. See, e.g., *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 237-243. The very core of the alleged unfairness is missing from this record due not to any fault of petitioners but to the failure of the court reporter to perform his statutory duty. Where the court processes have so broken down that an appeal cannot be properly adjudicated, the proper remedy would seem to be to vacate the judgments of conviction and to remand for a new trial. *Stephens* v. *United*